

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

February 25, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0798-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WESLEY HIGGINS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: STANLEY A. MILLER, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Wesley Higgins appeals from a judgment of conviction after a jury found him guilty of one count of first-degree reckless homicide while armed, as a party to a crime; and four counts of first-degree recklessly endangering safety while armed, as a party to a crime. He argues that he is entitled to a new trial because of the alleged introduction of extraneous and prejudicial information during jury deliberation. Because we

conclude that Higgins has not met his burden in showing by clear and satisfactory evidence the exact content of the extraneous jury information, we affirm.

I. BACKGROUND.

Police arrested Higgins for the fatal shooting of Robert Morris. According to the criminal complaint, shortly before midnight Morris was sitting in a car with his parents and two other individuals when Higgins, who had been waiting along the street, pulled a semi-automatic handgun from his waistband and fired it several times at the car. Morris died from a gunshot wound to his head.

The State charged Higgins with one count of first-degree intentional homicide while armed, as a party to a crime, and four counts of first-degree recklessly endangering safety while armed, as a party to a crime, and the case proceeded to a jury trial. Although several witnesses identified Higgins as the shooter, he testified that he was at his girlfriend's house on the night Morris was shot. The jury convicted Higgins of the lesser-included offense of first-degree reckless homicide on the homicide count, and all of the charged counts of first-degree recklessly endangering safety counts.

The day after the judgment of conviction was entered on the verdicts, the jury foreperson contacted the trial court, reporting that during the jury deliberations, Juror J.S. reported that he visited the crime scene and, further, that he discussed his visit with the other jurors. The trial court informed both counsels, and Higgins then moved the trial court to set aside the jury verdicts. At a hearing on the motion, the following testimony was procured.

The jury foreperson testified that on the day the verdicts were reached, Juror J.S. told her and several other jurors that "he had been to the crime scene late at night, that it was very dark there and very difficult to see." The foreperson testified that she became angry and "cut him off," and further testified that Juror J.S. then stated that "his sister lived two blocks from [the crime scene] so he had been in the area, so he thought he would check it out."

Juror J.P. testified that Juror J.S. told the other jurors "that he had driven to the crime scene to look to see if he was able to determine whether or not you were able to tell from the gate to the corner if you could see from the gate to the corner and what you could exactly see." He further told the jurors "that you could tell from the alleypoint by the gate to the corner he could see."

Juror R.M. testified that Juror J.S. told him that he had visited the crime scene during the evening and that "it was well lit." He also told him that "[he] wanted to hurry up and get [the case] done ... because he had to go to work."

Juror J.S., however, testified that he never made any statements to the other jurors about the crime scene. He emphatically denied that he said anything about visiting the crime scene to the jurors.

After hearing all the evidence, the trial court found that extraneous evidence was presented to the jury during its deliberations, and that this evidence was "in the form of a comment by one juror." The court determined, however, that from the evidence presented it was difficult to ascertain exactly what the juror said. The trial court found that "several jurors testified and their recollections and their perceptions varied." Nonetheless, without making a finding of exactly what the extraneous information was or what the jurors heard, the trial court denied the motion because the court concluded that "the introduction of the extraneous material" did not prejudice the defendant or materially affect the trial's outcome. The trial court then sentenced Higgins. This appeal follows.

II. ANALYSIS.

We will not overturn a trial court's decision to deny a defendant's motion for a new trial unless the trial court erroneously exercised its discretion. *State v. Eison*, 194 Wis.2d 160, 171, 533 N.W.2d 738, 742 (1995). "When a motion for a new trial is based on extraneous information improperly brought to the attention of the jury, the [trial] court must, in reaching its decision on the motion, decide underlying issues of both fact and law." *Id.* A trial court's "erroneous view of the facts or the law constitutes an erroneous exercise of discretion." *Id.*

In determining whether to overturn a verdict and grant a new trial because of juror misconduct, the trial court must first determine whether the jurors are competent to testify regarding the validity of the verdict. *Castaneda v. Pederson*, 185 Wis.2d 200, 209, 518 N.W.2d 246, 249-50 (1994). To promote verdict finality and maintain the integrity of the jury as a decision-making body, jurors cannot testify regarding statements made during deliberations and cannot testify regarding the deliberative process that took place in reaching a verdict. See § 906.06(2), STATS.; *State v. Shillcutt*, 119 Wis.2d 788, 793-94, 350 N.W.2d 686, 689 (1984). Section 906.06(2) provides an exception to this rule, allowing jurors to testify "on the question [of] whether extraneous prejudicial information was improperly brought to the jury's attention." The party seeking to impeach the verdict has the burden of proving that a juror's testimony is admissible by establishing: (1) "that the juror's testimony concerns extraneous information (rather than the deliberative processes of the jurors)," (2) "that the extraneous information was improperly brought to the jury's attention," and (3) "that the extraneous information was potentially prejudicial." *State v. Poh*, 116 Wis.2d 510, 520, 343 N.W.2d 108, 114 (1984). "The determination of potential prejudice required under [§] 906.06(2) is necessarily lower than that needed to successfully impeach the verdict." *Eison*, 194 Wis.2d at 175, 533 N.W.2d at 744.

Once the determination is made that a juror's testimony is competent and admissible under [§] 906.06(2), the [trial] court must then make a factual and a legal determination. The [trial] court must be persuaded by clear and satisfactory evidence that one or more jurors engaged in the alleged conduct. If the [trial] court makes the factual finding that one or more

jurors engaged in the alleged conduct, the [trial] court must then determine, as a matter of law, whether the extraneous information constituted prejudicial error requiring reversal of the verdict.

....

[T]he [trial] court must assess, as a matter of law, whether the conviction must be reversed because there is a reasonable possibility that the [extraneous information] would have had a prejudicial effect upon a hypothetical average jury.

Id. at 177, 533 N.W.2d at 744-45 (citations omitted). It is the State's burden to "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 178, 533 N.W.2d at 745 (citation omitted).

Applying this standard to the facts of this case, we conclude that the juror testimony was competent under § 906.06(2), STATS. A juror's testimony on the alleged comments of another juror about his independent investigation of the crime scene is clearly extraneous information improperly being brought to the jury's attention that was potentially prejudicial. *See Poh*, 116 Wis.2d at 50, 343 N.W.2d at 114.

We now must review the trial court's factual and legal findings to determine whether the jury verdict should be vacated. This is difficult here because the trial court did not make specific findings on what was allegedly said by Juror J.S. The trial court found that it appeared that Juror J.S. made a comment to other jurors, but that the nature of this comment was uncertain. Further, the trial court found that the juror "recollections" and "perceptions varied." Given the ambiguous nature of the juror's alleged comment, as presented by the juror testimony Higgins provided in support of his motion, Higgins did not meet his burden of showing specifically what Juror J.S.'s alleged conduct was by clear and satisfactory evidence. *Eison*, 194 Wis.2d at 177, 533 N.W.2d at 744. To assess the prejudicial effect the alleged extraneous information would have on a hypothetical jury, the party seeking to impeach the jury verdict must, at a minimum, show what that information was. Here, as

the trial court found, the jurors gave varied and sometimes contradictory versions of what Juror J.S. told them. This varied and contradictory testimony is “simply too ambiguous and disputed so as to justify a new trial.” *State v. Messelt*, 185 Wis.2d 255, 282, 518 N.W.2d 232, 244 (1994). Accordingly, we conclude that the trial court properly exercised its discretion when it denied Higgins's motion for a new trial.¹

By the Court.—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

¹ Although the trial court went on to conclude that the uncertain information did not prejudice Higgins, we need not reach this issue because it is clear that Higgins did not meet his burden of showing what the juror conduct was, and therefore the trial court properly denied Higgins's motion. See, e.g., *State v. Holt*, 128 Wis.2d 110, 124, 382 N.W.2d 679, 687 (Ct. App. 1985).